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NO. 81-2240

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA AND
ROBERT G. BRITTON, COMMISSIONER

Petitioners,

V.

DANNY RAY MYLAR, A/K/A
DANNY RAY MILES,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONERS

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REPLY ARGUMENT

I.

CONFLICTS REAL OR APPARENT

The Respondent asserts that there is no conflict between Anders v. California, (386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 [1967]) and Entsminger v. Iowa, (386 U.S. 748, 10 L. Ed. 2d 501, 87 S. Ct. 1402 [1967]) and the other cases on the Constitution and appeal. E.g. McKane v. Durston, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894); Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956); Brown v. Ohio, 360 U.S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164 (1959); Lane v. Brown, 372 U.S. 477, 9 L. Ed. 2d 892, 83 S. Ct. 768 (1963), and Draper v. Washington, 372 U.S. 487, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963). Ross v. Moffit, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974); Estelle v. Dorrough, 420 U.S. 534, 43 L. Ed. 2d 377,

95 S. Ct. 1173 (1974); Wainwright v. Torna, ____ U.S. ____, ____ L. Ed. 2d ____, ____ S. Ct. ____, 50 U.S. L. Wk. 3759 (1982) However, Counsel makes no effort to explain how the cases which are, "Concerned with the Constitutional requirements binding on a State in the administration of its appellate criminal procedures...." (Entsminger, 386 U.S. 748, 749, 18 L. Ed. 2d 501, 502) can be consistant with cases holding that the "...question is more profitably considered under an equal protection analysis...." (Ross, 417 U.S. 600, 611, 41 L. Ed. 2d 341, 351) In fact, the Respondent does not even cite any of the equal protection cases.

The fact, is that the Petition does not claim that there is necessarily a conflict between these two lines of cases, only that there is an apparent conflict. See the Petition, page 12. It

is also a fact that the Petition argues for the possible reconciliation of the two lines of cases, by reading Anders and Entsminger as requiring the States under the Equal Protection Clause to provide indigents with advocates rather than amicus curiae. On the apparent conflict the Petition argues:

> "...The apparent conflict arises when these cases "Anders and Entsminger] are read, not merely as requiring that the lawyer be an advocate but as requiring that he advocate in a certain sort of way...."
> (Petition pages 22-23)

There is an obvious distinction between saying something and saying nothing. A trial defense lawyer who told a Jury in open Court, "My client is guilty and deserves the maximum sentence," would be ineffective by any standards, even if the lawyer really believed that his client was guilty. However, every judicial day in this

country defense attorneys rest without presenting a defense, because there is no defense, and no one suggests that this is ineffectiveness. Carrying the same analogy to the appellate level, a similar distinction can be made between the lawyer who files a brief telling the appellate court that his client's appeal has no merit (see Anders, supra) and the lawyer who, finding nothing to brief, files nothing at all. The instant case presents a third situation: The filing of a brief is optional under the applicable rules, briefs are commonly not filed, and the lawyer, for whatever reason, files none.

II.

THE CASES RELATING TO COUNSEL AT TRIAL ARE NOT IN POINT

The Respondent relies heavily on Gideon v. Wainwright, (372 U.S 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733 [1967]); McMann v. Richardson, (397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 [1970]) and Cuyler v. Sullivan, (446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 [1980]). These cases all have one thing in common with each other and not with the instant case - they all involved trial rather than appellate counsel. The distinction between the right to counsel at trial and on appeal, which may have been somewhat obscured by Anders and Entsminger and which was obviously ignored by the Eleventh Circuit in the instant case, has been clearly recognized by this Honorable Court at least since 1974, when this Court issued Ross v.

Moffitt, (417 U.S. 60, 41 L. Ed. 2d 341, 94 S. Ct. 243 [1974]). In that case this Honorable Court wrote:

> "...By contrast, [with trial], it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being haled into court by the State and stripped of his presumption of innocence, but rather as a a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. McKane v.Durston, 153 U.S. 684, 38 L. Ed. 867 , 14 S. Ct. 913 (1894). The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. Douglas v. California, supra; Unfairness results only if indigents are singled out by the State and

> denied meaningful access to the appellate system because of their poverty...." (417 U.S. 600, 610-611, 41 L. Ed. 2d 341, 351) (Emphasis supplied)

In failing to make this vital distinction so clearly defined by this Honorable Court, the Eleventh Circuit ruled in patant conflict with the controlling decisions of this Honorable Court.

Applying the principles of Ross to this case, it simply can not be escaped that Mylar was not singled out nor was he denied meaningfull access to the appellate system. Mylar's lawyer, like every lawyer in Alabama criminal appeals, had the option of filing a brief or resting on the record. The Court of Criminal Appeals searched the record in Mylar's appeal for error as in every case, whether indigent or non-indigent, briefed or unbriefed. The inescapable fact is that Mylar's U.S. Constitutional rights to fairness and equal treatment were fully protected.

III.

CONFLICTS BETWEEN THE CIRCUITS

The Respondent asserts that there is no conflict between the Eleventh Circuit holding in this case and those of other circuits. This is a facinating argument, since the Eleventh Circuit itself acknowledged at least one conflict. See Mylar v. Alabama (11th Cir. 1982) 671 F. 2d 1299, 1302 footnote 4, Appendix to the Petition, page 96.

IV.

CALLING MYLAR'S APPELLATE COUNSEL "INCOMPETENT" BEGS TWO QUESTIONS

The Respondent bases his argument largely on the assumption that the failure of Mylar's appellate attorney to file a brief on original submission constituted incompetence. This argument begs not one but two questions: First, did the lawyer's omission constitute

incompetence, and second, and, more importantly, who decides the measure of competence of lawyers in state court appeals - the State Courts or the Federal Courts? This brings us right back to the fundamental issue in this case: Are appeal rights due process or equal protection in nature? If they are due process in nature, then it is not enough that the lawyer be an advocate; his advocacy must meet certain as yet undefined[1] standards. If these rights are equal protection in nature, then effective assistance of counsel on appeal

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[1] For example, if a lawyer must file a brief, must he also argue every issue or every adverse ruling? If there are five possible reversible errors in a case, and the lawyer does not argue three in order to concentrate his efforts and the Court's attention on the two he does argue, is he ineffective? On the other hand, is a lawyer ineffective if he argues twenty-five different issues, with the result that the Court overlooks his strongest issue? Must a lawyer ask for oral argument? If he does, must he argue every issue?

is a question of State law, so long as that law applies equally to all appellants.

CONCLUSION

In conclusion the Petitioners again respectfully submit that this case presents an apparent conflict in the opinions of this Honorable Court in various cases, the decision of the Court of Appeals conflicts with those of this Honorable Court and those of other circuits. For these reasons the Petitioners again pray that this Honorable Court will issue the writ of certiorari and review the decision and

opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted

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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama and Commissioner Britton, Petitioners, do hereby certify that on this _____day of July, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Danny Ray Mylar, Respondent, by mailing same to her, first class postage prepaid and addressed as follows:

Hon. Linda Friedman
Attorney at Law
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_____
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